United States
Circuit Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, *Plaintiff in error,* vs. THE UNITED STATES OF AMERICA, *Defendant in error.*	No. 2466.

PETITION FOR REHEARING

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PAUL BURKS,
Attorneys for Petitioner.
Plaintiff in error.

Dated, March 5, 1915.

The Neuner Co., Los Angeles, Cal.

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PETITION FOR REHEARING.

Comes now The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and respectfully moves this Honorable Court to grant a rehearing herein on the ground and for the reasons as follows, to-wit:

I.

The court erred in affirming the judgment rendered in the District Court of the United States.

II.

The court erred in not reversing said judgment.

III.

The court erred in holding that subdivision (i) of Rule No. 287 of the Interstate Commerce Commission made March 16, 1908, modifies Ruling No. 88 of the same body made June 25, 1908.

IV.

The court misinterpreted subdivision (i) of said Rule No. 287.

V.

Ruling (i) No. 287, and said Ruling No. 88 being necessarily inconsistent the court erred in not giving effect to Ruling No. 88, which was later in point of time.

VI.

The court erred in not giving effect to the ruling made by the Commission and reported to the Congress of the United States as the ruling of the Commission in the 22nd Annual Report of the Interstate Commerce Commission at pages 49 and 50, in which report, at page 50, the commission quotes the following as one of its administrative rulings:

> "Employes unavoidably delayed by reason of causes that could not at the commencement of a trip have been foreseen may lawfully continue on duty to the terminal or end of that run."

VII.

The court erred in not accepting and applying said Ruling No. 88 and the ruling quoted in the fore-

going paragraph as one of contemporaneous construction placed upon the Act by the body charged with its enforcement.

VIII.

The court erred in not holding said Ruling 88 and said ruling quoted in paragraph VI hereof a rule of property in conduct and in not sustaining it.

IX.

The court erred in substituting its own construction for that of the Interstate Commerce Commission, as set forth in said Ruling No. 88 and in said ruling quoted in paragraph VI hereof in respect to an enactment demanding construction.

X.

The court misapprehended the scope and meaning of Ruling (i) No. 287, and hence misinterpreted said ruling.

XI.

The court erred in holding that the plaintiff in error was required to relieve the train crew at San Bernardino, or at any other point short of Los Angeles, the end of the run.

XII.

The construction given by the court to the first proviso of the 3rd section of the Act is erroneous, and in any case it is in conflict with the declared construction thereof by the Interstate Commerce

Commission, as manifested in said Ruling No. 88 and in said ruling quoted in paragraph VI hereof.

XIII.

The court erred in holding that the word "terminal" affects any portion of the proviso of the 3rd section of the Act in question, except that part of the proviso which deals with causes not known to a carrier at the time when the employe left the terminal, the delays in this case being due to casualties and unavoidable accidents.

May it please your Honors, we are filing this petition for a rehearing in view of the fact that a petition for a rehearing has been filed by the San Pedro, Los Angeles & Salt Lake Railroad Company in Case No. 2412, on the authority of which case this case was decided, as stated in the opinion of your Honors. Because this case was so decided we deem it our duty to take such steps as may secure to The Atchison, Topeka and Santa Fe Railway Company the benefit of any reconsideration that may be given to Case No. 2412; and we desire to concur in and to have the benefit in this case of what is stated in the petition and argument for a rehearing submitted in said Case No. 2412.

ARGUMENT.

Under the circumstances we assume that it will not be necessary nor desirable to reproduce the argument which is made a part of the petition for rehearing in Case No. 2412, to which we could in any event add

but little. However, we desire to call again the court's attention to the fact not noticed in the opinion, and which we think has perhaps been overlooked, that the Interstate Commerce Commission not only made a ruling on the subject, in strict accordance with our contention, in June, 1908, as noted in the opinion, but on December 24, 1908, the Commission transmitted to the Senate and House of Representatives its 22nd Annual Report, and on pages 49 and 50 submitted to the body which had enacted the law under consideration the interpretation which the Commission had placed upon that law. And this interpretation placed upon the law by the body charged with the administration of the law was accepted by the Congress which enacted the law; for had the interpretation not been acceptable to the Congress that body would by resolution have declared the intent of the Act or by amendment changed it. Certainly it is difficult to conceive a more authoritative declaration of the meaning of the Act than is shown by the facts just noted.

We desire again to call the court's attention to the fact that the stipulation which is made a part of the bill of exceptions in this case and appears in the transcript, beginning at page 17, contains, in paragraph 15, at page 26, the statement that the word "terminal", as commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains, means the beginning or end of the employe's run, or the

or at which, in the ordinary course of business, he would go on duty as a member of a particular crew, or at which, in th eordinary course of business, he would cease to be a member of such crew of a particular train and be relieved from duty; the point at which he becomes a member of the train crew in charge of a particular train, and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew. And that it is not generally understood among railroad men that the word "terminal", as applied to any particular train or the crew thereof, refers to any relay or division point between the point at which an employe became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal, for other cars and other trains.

We desire, also to call the court's attention again to the proposition that the meaning of the word "terminal" is not important in Case No. 2466. In the stipulation of fact, which is a part of the bill of exceptions and is printed in the transcript, beginning at page 17, it is stated, at page 24, that the breaking of the axle whereby said train was delayed for a period of six hours and ten minutes between Bryman and Oro Grande was a casualty and an unavoidable accident.

Now, the word "terminal", where used in the proviso to section 3, has no reference nor connection with the words "casualty or unavoidable accident". It has reference only to such delays as are the result of a cause not known to the carrier, or its officers or agents, at the time said employe left the terminal. That is to say, where there is a casualty, or unavoidable accident, or the act of God intervening, the provisions of the Act do not apply. It is impossible to connect the word "terminal" with the first part of the proviso; otherwise, as pointed out in our brief, it would be impossible to make any application of the proviso to the case of a telegraph operator or dispatcher.

We therefore respectfully submit that a reconsideration and rehearing of this case ought to be granted. Dated, March 5, 1915.

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